No. 97-1

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

L. ALSTON; ASIAPRINT, LTD.; GLORIA BARON; ROBERT BASIST; MELLISSE BRYDGES; YOLANDA DESOTO; DWAINE DIRKS; ELSIE DIRKS; MICHAEL DYMOND; CORINE FREVERT; PATRICIA KARAGEORGE; THERESA LAUBER; KAREN LAWSON; LOTTIE LAWSON; THOMAS LAWSON; JIM MARTIN; DONNA MCCONNELL; STEVEN NASON; JOHN PROVOST; EUGENE SANCHEZ; DON SHERBO; MARILYN SUMMERS; PATRICIA A. TAYLOR; EVELYN TINNEY; RICHARD WELKER and SUZANNE WOODS,

Petitioners,

vs.

STATE OF ARIZONA, *ex rel.*, RICHARD C. HOUSEWORTH, Superintendent of Banks,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Arizona

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The List of Parties in the Petition is accurate. Richard C. Houseworth remains, as of this date, the Superintendent of Banks for the State of Arizona.

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APPENDIX

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STATEMENT OF THE CASE

This case challenges the dismissal of Petitioners' claims against a court-appointed receiver based on application of the state-law defenses of absolute derivative judicial immunity and laches. The trial court found the issues so settled that sanctions were awarded, a decision which was upheld by the Court of Appeals. This matter presents no important federal issue requiring resolution by this Court. The Petition for Writ of Certiorari should be denied.

Centuras Investment Company, Inc. ("Centuras") was a mortgage banker. Centuras was in the business of matching investors with borrowers who had properties which could be mortgaged. Arizona real estate practice generally uses deeds of trust, in which the lender obtains a "beneficial interest" in the property. In many cases, Centuras assigned the beneficial interests in these investments in percentages to various investors, and therefore never provided investors and other creditors with the original notes and mortgages.

Centuras became insolvent. It was placed in receivership by the Arizona Superior Court on December 7, 1987, pursuant to petition by the State Banking Department. Mary C. Short, Superintendent of Banks, was appointed Receiver. Appendix A at 32.[1]

A. Notice

There is no dispute that the Centuras investors were on

1. Citations to Appendices A-C refer to appendices to the Petition. Citations to Appendix 1 refer to the appendix hereto. Citations to the record below not included in the appendices are noted by item number from the Index prepared by the Superior Court, prefaced with a "D"; transcripts, added to the record below by supplement, are designated by "Tr." followed by the date of the hearing transcribed.

notice of the Receivership proceeding. Shortly after institution of the Receivership, copies of the Receivership Order were provided by the Receiver to all investors and borrowers of Centuras. Appendix A at 32. Petition 3 was also mailed to all investors. *Id.* Petition 3 requested authority to sell or abandon any interest the Receiver held in real property, which was specifically defined to include not only direct ownership but any "beneficial interest" in real property. Appendix C (Receiver's Petition 3 for Authority to Sell Real Estate or to Abandon Property Under Certain Conditions) at ¶ 1.[2]

However, because there were so many persons with potential interest in the proceedings (borrowers, investors, and other creditors), it was not practical to provide notice of all pleadings and other proceedings to everyone. Centuras had over 300 investors and borrowers, not counting other creditors. D. 128. As Thomas P. Sylvester, counsel for Petitioners in the trial court, described his experience:

> I was on that mailing list for awhile, and I begged to be taken off. . . . It is an inordinate amount of paperwork, all of which none of the petitioners as lay people would have a knowledge of the significance of them as they come in bits and pieces. And it would have cost them a fortune to have an attorney review everything that came in.

Tr. 12/21/93 at 17:7-19. Therefore, except for the early petitions discussed above, pleadings were routinely served only on parties

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2. Petitioners' contention that Petition 3 did not give notice that the Receiver might release notes and mortgages because they were not "real property" is specious. Mortgages, and interests therein, are interests in real property. *See Fremming Construction Co. v. Security Savings & Loan Ass'n*, 115 Ariz. 514, 566 P.2d 315, 317 (App. 1977).

to the action, *i.e.*, those who made a formal appearance in the Receivership action and thereby requested copies of all materials filed with the Court in the course of its supervision of the receivership. *Compare, e.g.*, D. 29 (Notice of Appearance of Richard E. Chambliss, 2/19/88) *with* D. 42 at 7 (Service list for Receiver's Response to Snyder Motion, showing Chambliss, 2/26/88).

Many investors and other creditors sought the release of notes and mortgages from the Receivership to them. Appendix A at 32; *see, e.g.*, Ds. 9 (Petition for Relief from Permanent Injunction, Neurological Associates of Tucson); 121 (Stipulation, Reeder). In response to such requests, several judges supervising the Receivership entered orders releasing notes. *See* Ds. 28 (Hon. Norman D. Hall, Jr.); 370 (Hon. Gloria G. Ybarra); 422 (Hon. J. Kenneth Mangum); 461 (Hon. Robert P. Murphy, Pro Tem); 479 (Hon. Sherry Hutt). Those persons who participated in the Receivership proceedings received notice of such actions, either by service of the creditor's petition, the Receiver's response, or the court's minute entries approving release. *See, e.g.*, Ds. 67 (Stipulation and Order, showing service of stipulation prior to execution of Order by Court, re Wild Horse Ranch note, March 1988); 169 (Petition for Relief from Permanent Injunction, August 1988); 245 (Receiver's Response to Motion for Modification Filed by Merabank, Nov. 1988); 63 and 115 (Minute entries, March and June 1988). Thus, before the end of 1988, anyone participating in the Receivership proceedings would have been well aware that the Receiver was releasing notes with court approval.

B. Petition 19 And The Objection

On October 26, 1992, the Receiver filed Petition 19 for approval of the First Interim Accounting, covering the period December 7, 1987 through April 30, 1991. Appendix A at 33.

The petition was served on the full Receivership service list. D. 484 (Petition 19). After an initial order approving the accounting, D. 507, two investors objected based on lack of notice. D. 514 (Motion for Reconsideration). The Receivership Court required service on all investors, D. 520; the Receiver thereafter provided notice to 293 customers, investors and creditors of Centuras on February 16, 1993. D. 531 (Notice Concerning Receiver's Filing of Petition 19).

Following some skirmishing over discovery, Appendix A at 34, in late October 1993, Petitioners served their Objection to Receiver's Interim Accounting Petition 19. The Objection was 126 pages long (including a markedly abbreviated service list), and was accompanied by two volumes of over 200 exhibits measuring more than 4 inches thick. The gravamen of the Objection was a claim that the Receiver had improperly made preferential transfers by releasing notes and mortgages to those who did not have actual possession of the notes. Objection at 15 and 87.[3] Petitioners attacked virtually every release ordered by the Court over the nearly six year history of the Receivership. As a result of this alleged mismanagement, Petitioners sought to surcharge the Receiver and his counsel: "The Receiver should be held liable for the damages caused to the parties to the Receivership Estate as outlined in the Petitioners' Objection herein." Objection at 125.

The Receiver moved to dismiss the Objection on the grounds, *inter alia*, of immunity and laches. D. 564 (Motion to Dismiss). The Receivership court determined that the Objection was not well-founded for all the reasons advanced by the Receiver, and awarded sanctions:

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3. Apparently due to its bulk, the Objection and its exhibits were not filed in the main court file, and therefore are not reflected in the index. They were filed as a supplement to the record, and are referenced herein as "Objection."

> The pleadings and objections of the objecting group, being without merit, have caused the receiver to spend funds in response. The immunity issue is well-settled law. The actions have unnecessarily expanded the scope of the proceedings, pursuant to Rule 11 and A.R.S. § 12.349, where pleadings are not filed in good faith and are unsupported by applicable case law.

Appendix 1, attached hereto, (Findings of Fact and Conclusions of Law) at 4a. The Findings of Fact and Conclusions of Law were signed by the Receivership court on May 18, 1994. Judgment was entered the same day, jointly and severally against Petitioners and their counsel, Sylvester. D. 590. Sylvester paid the award, and a Satisfaction of Judgment was filed. *See* Exhibit A to Motion to Dismiss the Appeal as Moot, filed December 23, 1994.

Petitioners appealed to the Arizona Court of Appeals, which affirmed the trial court in all respects. *See* Appendix A. A petition for review to the Arizona Supreme Court was denied on December 18, 1996. Petitioners then filed the Petition for Writ of Certiorari with this Court on March 18, 1997.[4]

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4. The Petition for Writ of Certiorari was "filed" on March 18, 1997, exactly 90 days after the denial of review. The Petition showed as counsel of record Ethan Steele, who is not a member of the bar of this Court. According to Rules 9(1) and 34(1)(g), Rules of the Supreme Court of the United States, the Petition was therefore not "filed" and was untimely. Rule 14(5) does provide for cure of such technical deficiencies within 60 days; however, Respondent has received no information that such a timely cure was made. If not, the Petition should be dismissed.

REASONS FOR DENYING THE WRIT

PETITIONERS ARGUE ISSUES OF STATE LAW, AND FAIL TO CITE ANY ISSUE OF UNSETTLED FEDERAL LAW.

The Petition sets forth four purported Questions Presented. None present an issue appropriate for consideration by this Court. Respondent will address each "Question" in the order presented.

A. Does the Due Process Clause of the United States Constitution, Fourteenth Amendment, protect the general creditors of a state court receivership during the administration of the estate and disposition of their interests therein?

The proposition cited in this question is not subject to dispute; of course, due process applies. The question is how much process is due, or specifically, whether the efforts by the Receiver to give notice to Petitioners were adequate. Petitioners received notice of the Receivership, and the manner in which releases of beneficial interests would be handled (Petition 3). After that, if they wished to receive further information, they were required to take some affirmative steps to participate in the proceedings, in accordance with general receivership practice. *See* 2 Ralph Ewing Clark, A Treatise on the Law and Practice of Receivers (3d ed.) at § 532(a)(an intervenor is generally interested in any order fixing priorities or distribution), § 532(c)(one who merely presents a claim is not a party). *Cf.* Federal Rule of Bankruptcy Procedure 4001(a) (on motion for relief from stay, limited notice required).

This procedure was adequate under Arizona law. *See Sawyer v. Ellis*, 37 Ariz. 443, 448-49, 295 P. 322, 324-25 (1931) (creditor

not entitled to notice of all receivership activity). Petitioners purport to question whether it was adequate under federal law, but cite no authority that it was not.

The constitutional requirement of due process does not impose a fixed or immutable standard. The standard is fluid, varying by the weight of the competing interests presented. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 902-03 (1976). Here, Petitioners were given notice of the institution of the receivership, and an opportunity to appear and actively participate, if they so chose. This is all thatdue process requires. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S. Ct. 2965, 2974 (1985) (notice of pendency of class action); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318, 70 S. Ct. 652, 657 (1950) (notice to beneficiaries re accounting for common trust fund). There is no due process requirement of notice of each individual acion during the course of the proceedings to those potentially affected but who choose not to participate. *Cf.* Federal Rule of Civil Procedure 23(d)(2) (notice during course of class action discretionary). The adequacy of notice to creditors presents no important federal issue requiring this Court's attention.

B. Where a state court appointed receiver erroneously determines priorities and distributes estate assets to creditors who lacked a perfected security interest therein, without first providing notice and opportunity to be heard to the other general creditors, does it violate due process to deny these injured general creditors a legal remedy?

First, this question rests on an incorect factual premise. Assuming pursuant to the standard on a notion to dismiss that the allegations of the Objection are correct that improper distributions were made, notice and an opportunity to be heard were provided to general creditors. Those creditors who chose

to actively participate in the Receivership received notice of each alleged distribution, and had the right to appear and object.

Second, this issue is not one of federal law; it is an issue of Arizona state law. The claims made against the Receiver by Petitioners, which were dismissed, were common law claims for surcharge. These claims are governed by state law, and the defense of immunity to such claims is one of state law as well. *See Acevedo v. Pima County Adult Probation Dep't*, 142 Ariz. 319, 690 P.2d 38, 41 (1984) (distinguishing between state and federal law standards for judicial immunity). Petitioners cite no authority for the proposition that there is a due process component to such a defense.

Third, this traditional application of the law of immunity does not leave creditors such as Petitioners without recourse; if creditors wish to challenge the actions of a receiver, they can become participants in the receivership proceedings and receive notice of petitions for court approval of actions that might affect the distribution of receivership assets. They would then have the appropriate opportunity to appear and be heard, on a timely basis. *See Sawyer v. Ellis*, 37 Ariz. at 449, 295 P. at 325; *Academy Life Ins. Co. v. Odiorne*, 165 Ariz. 188, 191, 797 P.2d 727, 730 (App. 1990) (competing claimant in receivership has right to appear in claims proceedings and assert defense not asserted by receiver). Petitioners chose not to assert any objections until the Receivership had been underway for years, and many actions had been undertaken which cannot be undone. The well-settled law of immunity does not need to be altered so that Petitioners can avoid the consequences of having slept on their rights.

C. Does the fact that a receiver is under state court supervision confer upon the receiver absolute immunity against liability for negligence and breaches of fiduciary duty, where such injurious actions were taken without the notice to the injured general creditors that due process requires?

Again, this question assumes (erroneously) that some unstated standard of due process was violated by the requirement that creditors concededly notified of the proceedings actually participate in order to receive notice of specific receivership petitions.

Also, this question once again presents a question of state, not federal, law. As noted above, the scope of judicial immunity to a state law claim is governed by state law, and was properly resolved by the Arizona State Court of Appeals in its decision in this action.

Finally, it is important to note that, contrary to the implication of the Petition, the Arizona Court of Appeals did not determine that the Receiver was immune for any negligent conduct he might undertake. The immunity upheld was the traditional absolute derivative judicial immunity for actions taken pursuant to court order. Petitioners disregard the factual determination made by the trial court, and affirmed by the appellate court, that each action challenged in their Objection was taken pursuant to a specific court order. *See* Appendix 1 at 4a, and Appendix A at 38. This Court should not accept certiorari to review such a factual finding. *See* Rule 10, Rules of the Supreme Court of the United States.

D. Does it comport with due process standards to confer absolute immunity upon a receiver by virtue of there being a court order approving the receiver's action, where the court order was obtained by the receiver without providing notice and an opportunity for general creditors to be heard?

Again, this issue is not really presented by this case; creditors were notified of the Receivership and the means by which the Receiver would deal with requests for release (Petition 3). Those who chose to participate also received notice of specific proceedings; Petitioners did not bestir themselves to do so.

Once again, Petitioners argue issues of fact, regarding the alleged control wielded by the Receiver over information provided to the Court.[5] Petitioners boldly ignore the finding that the Receiver acted pursuant to Court orders, including the Order regarding Petition 3. As the Court of Appeals noted in its decision:

> The order required that the receiver provide notice to the court, investors of Centuras secured by such property, and to specific borrowers involved in the property.

Appendix A at 38. Petitioners admittedly received Petition 3, including its request that the court approve a specific notice

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5. Petitioners also fail to provide this Court with any indication that an issue of federal law is presented. Petitioners cite two Supreme Court cases purportedly finding immunity not available where there was a lack of candor to the tribunal. In fact, both cases were decided on the basis that the allegations involved events preceding any judicial proceedings which might invoke the protection of judicial immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 2616-17 (1993) (pre-indictment investigation by prosecutor); *Malley v. Briggs*, 475 U.S. 335, 342-43, 106 S. Ct. 1092, 1097 (1986) (application for arrest warrant).

procedure. No objections were filed thereto by Petitioners. The Receiver followed the court-ordered procedure, and provided such notice, in obtaining approval of the actions of which Petitioners complain. The record further reflects that notice was additionally given to all who chose to participate in the general receivership proceedings, including general creditors. The Receiver did not completely control the information provided to the Court; rather, traditional methods of the adversary system were available to any sufficiently interested party.

Finally, Petitioners completely fail to provide any legal support for their argument that due process prevents the defense of immunity from applying unless each creditor received notice of every action affecting the assets of a receivership estate. In fact, the authority of this Court is contrary: "[N]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not reach every beneficiary are justifiable." *Mullane v. Central Hanover Bank*, 339 U.S. at 319, 70 S. Ct. at 659-60 (addressing need for notice of institution of proceeding). Here, Petitioners concede that all were notified of the institution of the Receivership; those most interested in objecting, shown by their participation in the process, received notice of each action. Due process was more than satisfied.

The two state court cases cited by Petitioners do not support their position.[6] In an antique South Carolina case, the court

6. In their Statement of the Case, page 14, n.15, Petitioners also reference two federal cases supposedly supporting the need for notice. However, neither case even discusses the concept. *See Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538, 542 (9th Cir. 1987) (action alleging violation of state law not an impermissible collateral attack where court order did not address specific claims); *First Empire Bank v. Federal Deposit Ins. Corp.*, 572 F.2d 1361 (9th Cir. 1978) (discussing scope of federal banking statute).

addressed failure to give notice of the initial order appointing receiver. *Koester v. Citizens' Publishing Co.*, 154 S.C. 154, 151 S.E. 452, 452 (1930). Here, in contrast, Petitioners concede they received a copy of the Order Appointing Receiver.

Petitoners also rely on a recent Arizona case, which addressed at length the difference between qualified and absolute immunity. *See Adams v. State*, 185 Ariz. 440, 916 P.2d 1156 (App. 1995). Neither notice nor due process was addressed. Rather, the court emphasized the factors of whether the conduct challenged was done pursuant to court order, and whether the function was integral to the judicial process. *Id.*, 916 P.2d at 1160-61. The court determined that a social worker investigating potential adoptive parents, who was not court-appointed and did not act under the direct supervision of the court, was not entitled to absolute immunity.

In stark contrast, this case deals with a receiver. A receiver is wholly a creature of the court. *Stowell v. Arizona Savings & Loan Ass'n*, 93 Ariz. 310, 311, 380 P.2d 606, 607 (1963). As such, receivers' involvement in the judicial process has traditionally entitled them to immunity:

> [I]t is not a novel principle that a court-named receiver, as an instrument of the court that appoints it, may not be sued for damages for activities in carrying out its office. Long ago the Supreme Court explained: [a receiver] is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in custodia legis. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. The court will not allow him to be sued touching the property in his charge, or for any malfeasance as to the

> parties, or others, without its consent. . . . Davis v. Gray, 83 U.S. 203, 218, (1862) [sic; 1872].

Capitol Terrace, Inc. v. Shannon & Luchs, Inc., 564 A.2d 49, 52 (D.C. 1989). The Petition gives no reason why this Court should reconsider this long-standing doctrine.

CONCLUSION

Petitioners present no persuasive reason why this Court should review the decision of the Arizona State Court of Appeals. No issue of national importance or unsettled federal constitutional law is presented herein. Nor is there a question of substantial injustice; the sanctions awarded have already been paid by counsel below, who did not join in the appeal. If anything, considerations of justice weigh in favor of denying review: Petitioners seek to reopen years of the administration of the Receivership, after failing to take any timely steps to protect their alleged interests. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX 1 — FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED MAY 18, 1994

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. CV 87-32891

(Assigned to the Hon. Sherry Hutt)

STATE OF ARIZONA, ex rel. RICHARD C. HOUSEWORTH, Superintendent of Banks,

Plaintiff,

vs.

CENTURAS INVESTMENT COMPANY, INC.,

Defendant.

FINDINGS OF FACT & CONCLUSIONS OF LAW

This matter came before the Court upon the following pleadings:

Appendix 1

1. Objection to Receiver's Interim Accounting Petition 19 filed by the Objecting Petitioners represented by attorney Thomas P. Sylvester, including their Petition included within said Objection, dated October 22, 1993.

2. Receiver's Motion To Dismiss Objection Filed By The Sylvester Group & For Sanctions, dated November 9, 1993.

3. The Objecting Petitioners' Response to Receiver's Motion to Dismiss, and Request for Written Findings of Fact and Conclusions of Law, dated November 29, 1993.

4. The Objecting Petitioners' Notice Of Amendment Of Petition Accompanying Petitioner's Objection To Receiver's First Interim Accounting, including their First Amended Petition, dated November 29, 1993.

5. Receiver's Reply To The Objecting Petitioners' Response To Receiver's Motion To Dismiss Objection Filed By The Sylvester Group & Their Request For Written Findings Of Fact And Conclusions Of Law, dated December 15, 1993.

6. Receiver's Motion To Dismiss The First Amended Petition Filed By Objecting Petitioners and Receiver's Motion For Security For Costs Regarding The Objecting Petitioners (Sylvester Group), dated December 15, 1993.

7. The Receiver's Motion For Award Of Attorney's Fees, Costs & Sanctions Against Thomas Sylvester And The Objecting Petitioners, dated January 21, 1994.

8. The Objecting Petitioners' Response To the Receiver's Motion For Award Of Attorney's Fees, Costs & Sanctions

Appendix 1

Against Thomas Sylvester And The Objecting Petitioners, dated February 8, 1994.

9. The Receiver's Reply To Objecting Petitioners' Response To Motion For Award Of Attorney's Fees, Costs & Sanctions Against Thomas Sylvester And The Objecting Petitioners, dated February 16, 1994.

FINDINGS OF FACT

Upon the pleadings and evidence presented, THE Court FINDS AS FOLLOWS:

1. The Receiver's description of "The Sylvester Group" refers to the following Objecting Petitioners who, through their attorney, Thomas P. Sylvester, have previously filed an Objection to Receiver's Interim Accounting Petition 19:

> L. Alston; ASIAPRINT; LTD.; Gloria Baron; Robert Basist; Mellisse Brydges; CANYON STATE EQUITY, a/k/a CANYON STATE EQUITY, INC.; Yolanda DeSoto; Dwaine Dirks; Elsie Dirks; Michael Dymond; Corine Frevert; Muriel Gray; Boniface Herrman; Patricia Karageorge; Steven Ketchel; Theresa Lauber; Karen Lawson; Lottie Lawson; Thomas Lawson; Jim Martin; Donna McConnell; Steven Nason; John Provost; Eugene Sanchez; Gregg Sasse; Don Sherbo; Marilyn Summers; Patricia A. Taylor; Evelyn Tinney; Richard Welker; and Suzanne Woods.

2. The Receiver has been operating pursuant to Court Orders. The objections to the application of law do not give rise to liability of the Receiver where, as here, the Receiver has adhered to the Court's Orders. The Objectors do not indicate in any way that the Receiver deviated from Court Orders. The Receiver has therefore not breached his fiduciary duty and is immune from suit.

3. There have been years of actions by the Receiver pursuant to Court Order which were not objected to by the now "objecting petitioners." Those complaints are now barred by laches. Creditors have received assets which may not now be retrieved. There is great prejudice to the receivership if a claim were now to go forward to raise an issue of protection for unsecured creditors.

4. Further, certain of the moving parties do not have clean hands. Objectors Sylvester, Ketchel, Herrman, and Canyon State Equity now present arguments inconsistent with prior pleadings and representations.

5. Gray, Sasse, and Herrman bring untimely objections.

6. The pleadings and objections of the objecting group, (the Objecting Petitioners), being without merit, have caused the Receiver to spend funds in response. The immunity issue is well-settled law. The actions have unnecessarily expanded the scope of the proceedings, in violation of the provisions of Rule 11 and A.R.S. § 12-349, in that the objectors' pleadings were not filed in good faith and are unsupported by applicable case law.

7. The Receiver's request for an award of attorney's fee in the amount of $14,425.00 is reasonable and the expenses of

$2,490.28 for WESTLAW computerized legal research time was reasonable and necessary under the circumstances and such expenses are allowable under Rule 11.

8. Pursuant to Rule 11, the Objecting Petitioners' pleadings were not warranted by existing law and were interposed to delay and expand the litigation.

9. The Objecting Petitioners did not appear to make any effort to determine the validity of their claims prior to filing their Objection or to reduce and narrow invalid claims after commencement of the action. The facts were available to assist the objectors prior to the filing of the action. There was no indication that the objectors are any less financially able to pay the fees and costs than the beneficiaries of the receivership who are the parties damaged by the actions of the objectors. There were no reasonable issues in conflict and the Receiver prevailed on all issues.

10. A sanction of $100.00 per person is reasonable and fair.

CONCLUSIONS OF LAW

1. The Receiver is immune from liability for all actions taken pursuant to Court orders. *Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599 (11th Cir. 1985); *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298 (9th Cir. 1989).

2. The Objectors' claims are barred by laches.

3. Stephen (Steven) Ketchel, Boniface Herrman and Canyon State Equity have unclean hands. *Rhine v. Terry*, 111 Colo. 506, 143 P.2d 684 (1943).

Appendix 1

4. The Objectors are estopped. *Graham v. Asbury*, 112 Ariz. 184, 540 P.2d 656, 658 (1975).

5. The Objectors failed to comply with the procedure promulgated by the Court in its Order of March 8, 1993.

6. The Objections of Muriel Gray, Gregg T. Sasse and Boniface Herrman are barred by this Court's Order of March 8, 1993. On October 26, 1992 Receiver filed his Petition 19 For Approval Of First Interim Accounting & Report Covering The Period December 7, 1987 To April 30, 1991. The Court granted the Petition on December 9, 1992 and approved the First Interim Accounting. On February 1, 1993 the Court, by minute order, directed the Receiver to send a notice to those persons who had *not* previously received a copy of Petition 19, advising them of the procedure to follow if they wished to object to the First Interim Accounting, notwithstanding that it had been approved by the Court. The order provided that "All objections shall be filed in 30 days." On February 19, 1993 Receiver filed his Proof Of Mailing Of Notice Concerning Receiver's Filing Of Petition 19 & First Interim Accounting. This document, in the form of an affidavit executed by Deputy Receiver Judy Hudson, states that the required notice was sent on February 16, 1993. A copy of the Notice Of Filing Of Receiver's Petition 19 & Of Your Right To Object was attached to Ms. Hudson's affidavit. In compliance with this Court's order of February 1, 1993, the Notice recited that any objection to Petition 19 and the First Interim Accounting would have to be filed within thirty days of February 16, 1993.

Prior to the mailing of the Notice to investors, attorney Thomas Sylvester had filed various pleadings on behalf of Dirks and Roberts. On March 16, 1993 he filed a Notice of Appearance

on behalf of numerous persons, but Muriel Gray, Gregg T. Sasse and Boniface Herrman were not among those listed. The Notice of Appearance listed various persons as being represented by Mr. Sylvester, *except* Muriel Gray, Gregg T. Sasse and Boniface Herrman. The Notice did *not* include a statement that those persons were objecting to Petition 19 and the First Interim Accounting.

On March 8, 1993 the Court, by minute order, stated:

> "This ruling contemplates that the March 19, 1993 cut-off will be effective as to the identity of those objecting and not as to the full substance of the objections."

On April 16, 1993 Mr. Sylvester filed a Motion to Permit Investors Muriel Gray, Gregg T. Sasse and Boniface Herrman to File Objections to the Receiver's Accounting. The Receiver's Response was filed on April 21, 1993. On May 10, 1993 the Court impliedly denied this motion:

> "IT IS ORDERED as follows:
> Mr. Sylvester is referred to the Orders of March 8, 1992.[1] The purpose of discovery is to enable Mr. Sylvester's clients who have timely noticed objections, to prepare the substance of those objections. * * *"

By referring Mr. Sylvester to its Order of March 8th, the Court was reiterating that March 19, 1993 was the cut-off date for any claimant to file a notice that he objected to the accounting. Since Muriel Gray, Gregg T. Sasse and Boniface

1. The court obviously was referring to the *1993* order.

Herrman failed to comply with the earlier order, they are barred from contesting the accounting.

7. WESTLAW research expenses are recoverable. While there exists a split of authority on the recovery of computerized legal research charges, "A majority of Courts have found it to be a reimbursable expense." *In re Bank of New England Corporation*, 134 B.R. 450 (E.D. Mass. 1991). Those Courts which have denied recovery consider the expense part of overhead. This, however, is an unrealistic view. *Timberland Design Inc. v. Federal Deposit Insurance Corporation*, 745 F.Supp. 784 (D. Mass. 1990), *aff'd*, 932 F.2d 46 (1st Cir. 1991); *United Nuclear Corp. v. Cannon*, 564 F.Supp. 581, 592 (D. R.I. 1983); *Harman v. Lyphomed, Incorporated*, 945 F.2d 969, 976 (7th Cir. 1991); *Steinlauf v. Continental Illinois Corporation*, 962 F.2d 566, 570 (7th Cir. 1992).

8. Receiver's Motion for Security for Costs is moot. However, in the event the Objecting Petitioners should file any further pleadings seeking affirmative relief against the Receiver the Receiver may reurge said motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Receiver's Motion To Dismiss Objection Filed By The Sylvester Group & For Sanctions is granted as to both the original Objection and Petition and as to the First Amended Petition.

FURTHER ORDERED that this Court does not reach or take action in the context of this ruling on the alleged ethical issues regarding attorney Thomas Sylvester, except as to the consideration of sanctions.

Appendix 1

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Receiver is awarded his costs and attorneys fees specific to responding to the objection. The sanctions shall be assessed jointly against the objectors and their counsel, Thomas P. Sylvester.

DONE and ORDERED this *18th* day of *May*, 1994.

Hon. Sherry Hutt
JUDGE OF THE SUPERIOR Court